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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 70.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, *et al.*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF PLAINTIFFS.

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vs.

METROPOLITAN LIFE INSURANCE COMPANY.

BRIEF ON BEHALF OF PLAINTIFFS.

Statement.

The question of the appealability of the order of December 29, 1941 arose in the following manner. Plaintiffs had instituted an action at law against defendant in the New Jersey Supreme Court to recover the death benefits of certain life insurance policies. On defendant's application the suit was removed to the United States District Court for the District of New Jersey and thereafter the defendant served an answer to the complaint and a counterclaim for cancellation and rescission of the policies, both the answer and counterclaim alleging fraud in the procurement of the policies. Upon plaintiffs' motion to dismiss the counterclaim the District Judge ruled that although this Court has in similar cases held that the equitable remedies of

cancellation and rescission will be denied since the relief at law is adequate* the doctrine of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64 (1938) compelled the court to permit the counterclaim to stand because it alleges sufficient grounds for equitable relief in the Court of Chancery of New Jersey (42 F. Supp. 488). As a consequence of this ruling an order was made denying plaintiffs' motion to dismiss the counterclaim and staying a jury trial of the issue raised by the complaint until after a non-jury trial of the issue raised by the counterclaim. Plaintiffs sought a review in the Circuit Court of Appeals for the Third Circuit of the propriety of this order. The defendant by motion questioned the appealability of the order and the Circuit Court of Appeals certified the question to this Court.

Summary of Argument.

The plaintiffs took their appeal pursuant to the provisions of Section 129 of the Judicial Code, 26 Stat. 828 (1891), as amended, 28 U. S. C. § 227 (1940), which permits appeals from interlocutory orders granting injunctions. It is plaintiffs' contention that since the order stays the trial of plaintiffs' legal action until after the trial of defendant's equitable counterclaim, it is in substance a preliminary injunction and therefore appealable under the section cited.

The Circuit Court's question if answered in the negative, as defendant urges, will produce a situation under which a beneficiary of a life insurance policy who brings an

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*e. g. *Buelow* v. *New York Life Insurance Co.*, 293 U. S. 379 (1935); *Adamos* v. *New York Life Insurance Co.*, 293 U. S. 386 (1935); *Phoenix Mutual Life Insurance Co.* v. *Bailey*, 13 Wall. 616 (1871).

action thereon will be denied a jury trial until he first defends in a non-jury trial the insurance company's claim to cancellation of the policy—without being afforded the opportunity to have an appellate court pass upon the question whether the claim to a right of cancellation was properly injected into the case. An affirmative answer, on the other hand, will enable the beneficiary before being put to the expense and delay of a separate trial on the company's counterclaim, to obtain a review of the lower court's determination that the insurance company may convert a jury action on the policy into a non-jury action for cancellation by the mere filing of an equitable counterclaim.

ARGUMENT.

The order is appealable under Section 129 of the Judicial Code, 26 Stat. 828 (1891), as amended, 28 U. S. C. § 227 (1940).

The District Judge, after denying plaintiffs' motion to dismiss the counterclaim, effectively enjoined a jury trial of the issues raised by the plaintiffs' complaint and defendant's answer until a non-jury trial on the defendant's counterclaim shall have been held. Such an order has injunctive force and, although interlocutory, is appealable by virtue of Section 129 of the Judicial Code which provides in part:

> "Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or

> refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; * * *"

It will be seen that this section permits an appeal to the Circuit Court of Appeals "Where, upon a hearing in a district court * * * an injunction is granted * * * by an interlocutory order or decree." This Court in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379 (1935) held that the defense of fraud in the procurement of a life insurance policy was a legal defense to the action already begun and an order directing that an equitable defense should be heard first amounted to a preliminary injunction and was appealable under the section quoted above. The insurance company had sought and the district court allowed a trial of the equitable issue "by a chancellor according to equity procedure in advance of the trial by jury at law of any purely legal issues" (293 U. S. at 381). This Court directed the district court to vacate its order for a hearing in equity and proceed with the trial of the action at law. The ruling in the *Enelow* case has often been and is still being invoked.

Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U. S. 449 (1935);

New York Life Insurance Co. v. *Panagiotopoulos*, 80 F. (2d) 136 (C. C. A. 1st, 1935);

Daniels v. *Brown Shoe Co.*, 77 F. (2d) 899 (C. C. A. 1st, 1935);

Metropolitan Life Insurance Co. v. *Banion*, 86 F. (2d) 896 (C. C. A. 10th, 1936);

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Modin v. *Matson Navigation Co.*, 128 F. (2d) 194 (C. C. A. 9th, 1942);

See also:

Deckert v. *Independence Shares Corp.*, 311 U. S. 282, 287 (1940);
King Mechanism & Engineering Co. v. *Western Wheeled Scraper Co.*, 59 F. (2d) 546 (C. C. A. 7th, 1932);
Taylor v. *Spurway*, 72 F. (2d) 97 (C. C. A. 5th, 1934);
Colorado Central Power Co. v. *City of Englewood*, 89 F. (2d) 233 (C. C. A. 10th, 1937).

The defendant concedes that prior to the adoption of the Federal Rules of Civil Procedure the order here in question would have been appealable under the ruling in the *Enelow* case (Brief, p. 3). Defendant argues, however, that procedural changes brought about by the promulgation of the Federal Rules of Civil Procedure have done away with this right of appeal. The defendant's argument is manifestly unsound.

The plaintiffs' cause of action was originally asserted as an action at law in the New Jersey Supreme Court. There plaintiffs would have been entitled to a trial by jury on the issues raised by the plaintiffs' complaint and the defendant's answer. The removal of the action to the federal court did not impair this right to a jury trial and plaintiffs would have had their day in court upon the case being reached in regular course on the calendar of jury causes. However, the defendant interposed a counterclaim patterned after the separate bill in equity which is recog-

nized in the Court of Chancery of New Jersey. Such a bill raises equitable issues triable before the Chancellor—in the federal court to the Judge as a Chancellor.* When the matter finally abided in the federal court, therefore, it was an action involving a complaint by plaintiffs and an answer by defendant raising legal issues triable before a jury, and a counterclaim by defendant raising (improperly, as plaintiffs contended in the district court) equitable issues triable before a judge without a jury. It became, as defendant contends, a civil action in which both legal and equitable relief are obtainable in the same proceeding (Brief, p. 10). If the circumstance thus presented is similar to that which prevailed in the *Enelow* case the defendant's argument is shown to be devoid of merit. Let us, then, examine the situation as it existed at the time of the decision in the *Enelow* case.

Prior to the adoption of the Rules of Civil Procedure a party was permitted by virtue of section 274b of the Judicial Code, 38 Stat. 956 (1915), to set up in his answer an equitable defense which would be heard as though it were on a separate bill. In a single action both legal and equitable issues were adjudicated. As Chief Justice Taft, speaking of the practical effect of section 274b, pointed out in *Liberty Oil Company* v. *Condon National Bank*, 260 U. S. 235, 242 (1922):

> "The situation thus produced was quite like that under state civil codes of procedure in which there is but one form of civil action, the formal distinction

* From early times appeals were allowed to be taken from interlocutory orders made in the New Jersey Court of Chancery granting or refusing to grant an injunction against prosecution of a law action. Yard v. Pacific Mutual Ins. Co., 10 N. J. Eq. 480 (E. & A. 1856). This right is now declared by statute. New Jersey Revised Statutes, 1937, 2:29-117.

> between proceedings in law and equity is abolished and remedies at law and in equity are available to the parties in the same court and the same cause."

And in *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U. S. 430, 432 (1932), this Court in holding that an interlocutory order dismissing an equitable counterclaim is appealable, said:

> "It is clear that in this suit the court in a single decree may finally determine the merits of the cause of action alleged in the complaint and the counterclaim set up in the answer."

Thus even before the adoption of the Rules of Civil Procedure *technical* distinctions between proceedings at law and in equity had been abolished. *United States* v. *Richardson*, 223 Fed. 1010, 1013 (C. C. A. 4th, 1915); *Stamey* v. *United States*, 37 F. (2d) 188, 189 (D. C. Wash., 1929); *Hartford Fire Insurance Co.* v. *Nance*, 12 F. (2d) 575, 580 (C. C. A. 6th, 1926). Although a distinction between a law side and an equity side was recognized its effect was mainly to differentiate issues triable by jury from those triable by a judge without a jury. Cf. *Johnson* v. *Capital Life Insurance Co.*, 78 F. (2d) 369, 370 (C. C. A. 9th, 1935); *Keatley* v. *United States Trust Co.*, 249 Fed. 296 (C. C. A. 2d, 1918) cert. dis. 254 U. S. 658.

At the time of the decision in the *Enelow* case, therefore, both equitable and legal issues were disposed of in one action and Chief Justice Hughes in that case adverted to this, saying, "the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court" (293 U. S. at 382). Then, as under the present practice, in the same court and in the

same action one judge was empowered to preside over the trial before a jury of the legal issues and himself determine the equitable issues. But when this same judge ordered that the jury trial should be stayed until the equitable issues were decided he in effect issued a preliminary injunction, thereby enabling the aggrieved party to obtain a review in an appellate court of the propriety of an order which would permit the interposition of an equitable issue and its determination by the court before a jury trial of the legal issues could be had. *Enelow* v. *New York Life Insurance Co., supra.*

What, then, is the nature of the change effected by the Rules of Civil Procedure which defendant claims has abrogated this right of appeal? Defendant contends that Rule 2, by providing that "There shall be one form of action to be known as 'civil action' ", has now made it possible to have both legal and equitable relief in the same proceeding; that an injunction staying trial of the legal issue until after disposition of the equitable issue is no longer possible. The conclusive answer to this argument lies in the fact that what was done in the *Enelow* case and what defendant says *cannot* now be done actually *was* accomplished in the present case. The order, prepared by the attorneys for defendant and entered upon their motion, provides that "the issue raised by the counterclaim of the Metropolitan Life Insurance Company be heard and disposed of by the court sitting in equity prior to the issue raised by the complaint filed by the plaintiffs in the action at law in which a jury trial has been demanded by the plaintiffs." The question is not whether Rule 2 has rendered section 274b of the Judicial Code ineffective but

rather whether this order of the District Judge has the same injunctive force as had the order in the *Enelow* case. In point of fact the District Judge has enjoined the trial of plaintiffs' claim until the happening of a contingency, namely, the disposition of the issue raised by defendant's counterclaim as, for example, was done in the early case of *Pennsylvania Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 55 Fed. 131 (C. C. A. 5th, 1893). There an intervenor in a suit to foreclose a mortgage obtained an order which set aside a temporary order appointing a receiver and stayed proceedings in the suit until further order. On a motion to dismiss an appeal from this interlocutory order the court said (p. 136):

> "In our opinion, to order, at the prayer of one party, that all further proceedings in the cause shall be stayed until the further order of the court, is to grant an injunction, within the meaning of the seventh section of the act of March 31, 1891. It follows that the appellee's motion to dismiss this appeal must be denied."

See also *Zalatuka* v. *Metropolitan Life Insurance Co.*, 108 F. (2d) 405 (C. C. A. 7th, 1939).

Moreover, in view of the particular circumstances of this case it is especially difficult to comprehend defendant's argument that under the changed practice there is only one proceeding and the order appealed from "can no longer validly be regarded as an injunction of a separate proceeding" (Brief, p. 12). The defendant by filing its counterclaim sought to cancel the contracts which form the basis of plaintiffs' action. Had the action not been removed to the federal court defendant's remedy would have been an

independent action in the Court of Chancery of New Jersey. Does it lose its identity as a separate proceeding because designated a counterclaim? A counterclaim is substantially a cross action by the defendant against a plaintiff and it "secures to defendant the full relief which a separate action at law, a bill in Chancery, or a cross bill would have secured him on the same state of facts." 57 C. J. p. 366 § 11. As the court noted in *Hann* v. *Venetian Blind Corporation*, 15 F. Supp. 372, 376 (D. C. Cal., 1936):

> "A counterclaim is a cause of action in favor of a defendant upon which he might have sued the plaintiff and obtained affirmative relief in a separate action—whether it arises out of the contract or transaction on which plaintiff's claim is bottomed or not. • • • This assertion of a right of action in the defendant is of the very essence of a counterclaim. By it, the defendant becomes an actor in the suit. And thus each party is at once a plaintiff and defendant. • • • It is so far an independent action as that it must be pleaded with like sufficiency as the law requires, if a new and independent action were brought by the defendant against the plaintiff."

See *Farr* v. *Dato*, 99 F. (2d) 703 (C. C. A. 7th, 1938); *Schram* v. *Lucking*, 31 F. Supp. 749 (D. C. Mich., 1940), aff'd 117 F. (2d) 160; *Brown Paper Mill Co.* v. *Agar Mfg. Corp.*, 1 F. R. D. 579 (D. C. N. Y., 1941).

Rule 13 of the Rules of Civil Procedure governs "counterclaim and crossclaim" and it is significant that subdivision (i) of that rule permits the entry of a separate judgment on a counterclaim. To say, therefore, that the defendant's equitable counterclaim is not separate and dis-

tinct from the plaintiffs' complaint is to disregard the nature and effect of a counterclaim. Its distinctiveness was emphasized in *Daniels* v. *Brown Shoe Co.*, 77 F. (2d) 899 (C. C. A. 1st, 1935) where in holding an order to be appealable under the ruling in the *Enelow* case, the court said:

> "• • • the bill is not an equitable defense; it is, as it is entitled, a counterclaim. The plaintiff moved to strike it out. The District Judge allowed the motion, struck out the counterclaim, and put the case on the law list for trial."

So far is the separate identity of the plaintiffs' action and the defendant's counterclaim observed that an appeal from the dismissal of a counterclaim cannot now await the final determination of the cause but must be taken within the time allowed for appeals from final judgments. *Jefferson Electric Co.* v. *Sola Electric Co.*, 122 F. (2d) 124 (C. C. A. 7th, 1941). Even the claims of one party against another asserted in a single action are severable to such an extent as to permit an immediate appeal from a judgment on one of the claims while the other is still pending. *Reeves* v. *Beardall*, 316 U. S. 283 (1942); *Sidis* v. *F-R Pub. Corp.*, 113 F. (2d) 806 (C. C. A. 2d, 1940), cert. den. 311 U. S. 711. This Court in the *Reeves* case held that separate judgments may be entered on distinct claims in a single action—a holding which involves a recognition of the fact that a civil action is not necessarily a unified whole in which there can be no segregation of claims, equitable or legal, and in which there can be only one final judgment, as defendant claims (Brief, p. 18). By clear implication this Court has shown in the *Reeves* case that a civil action may be comprised of separate proceedings which may be dealt with severably.

It is quite apparent, therefore, that defendant's contention that the plaintiffs' and the defendant's respective actions are merely phases of one proceeding which the court cannot adjudicate independently of one another lacks reality. The court is now often called upon to act as both law judge and chancellor in a single cause, as was true prior to the adoption of the Rules of Civil Procedure, and numerous cases tend to evidence the limited effect of the so-called fusion of law and equity. Indeed, the order from which plaintiffs have appealed is living proof that the fusion is a type of symbiosis. The distinction between law and equity must persist as a constitutional requirement.* *Bennett* v. *Butterworth*, 11 How. 669 (1850); *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235 (1922). What was an action at law is still an action at law, and what was a bill in equity is still a civil action founded on principles of equity. See *Williams* v. *Collier*, 32 F. Supp. 321 (D. C. Pa., 1940); *Fraser* v. *Geist*, 1 F. R. D. 267 (D. C. Pa., 1940); *Ransom* v. *Staso Milling Co.*, 2 F. R. D. 128 (D. C. Vt., 1941); *Fitzpatrick* v. *Sun Life Assurance Co. of Canada*, 1 F. R. D. 713 (D. C. N. J., 1941). In order to comply with the Seventh Amendment to the federal constitution which preserves jury trials "in suits at common law" it is essential to determine whether the cause of action pleaded would have entitled the party to a jury trial at common law. See, e. g. *Bellavance* v. *Plastic-Craft Novelty Co.*, 30 F. Supp. 37 (D. C. Mass., 1939) where the court said:

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* The Constitution recognises the traditional distinction between these two collateral systems of jurisprudence. Art. III, section 2, paragraph 1 provides that: "The judicial power shall extend to all cases, in law and equity, arising under this constitution * * *." The Seventh Amendment provides that: "In suits at Common Law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *." The Eleventh Amendment provides that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity * * *."

> "Inasmuch as this amendment applies only to suits at common law, a distinction will always need to be drawn between suits at law and suits in equity in order to determine whether one has a right, under the Constitution, to have the issues of the case determined by a jury."

Accord: *Ransom* v. *Staso Milling Co.*, 2 F. R. D. 128 (D. C. Vt., 1941); *Fitzpatrick* v. *Sun Life Assurance Co. of Canada*, 1 F. R. D. 713 (D. C. N. J., 1941); *Comfy Mfg. Co.* v. *Dyer-Gruen Jackson, Inc.*, 2 F. R. D. 293 (D. C. Pa., 1942); *Folmer Graflex Corporation* v. *Graphic Photo Service*, 41 F. Supp. 319 (D. C. Mass., 1941); *Berman* v. *Automobile Insurance Co. of Hartford*, 2 F. R. D. 94 (D. C. N. J., 1941).

The federal courts are repeatedly called upon to determine whether a proceeding should be placed in the category of equitable causes. See *Axt* v. *London & Lancashire Indemnity Co.*, 42 F. Supp. 1013 (D. C. Wis., 1942) "• • • this was an equitable proceeding"; *Folmer Graflex Corporation* v. *Graphic Photo Service*, 41 F. Supp. 319 (D. C. Mass., 1941) "This action is in the nature of an old action in equity"; *Lawyers Trust Co.* v. *W. G. Maguire*, 2 F. R. D. 310 (D. C. Del., 1942) "The petition • • • is an appeal to the power of this Court as a Court of Equity." Dean Pound's remark in "Fifty Years of American Equity" (1936) 50 Harv. L. Rev. 171, 179-181 that "Equity continues to exist though separate equity practice disappears" is appropriate in relation to the present federal practice. See also Holdsworth, Equity (1935) 51 L. Q. Rev. 142, 159-161 emphasizing the necessity for the study of equity as a separate subject in England sixty-one years after the Judicature Acts of 1873 and 1875 united the Court of Chancery,

the common law courts and certain other courts into one Supreme Court of Judicature. And see Chafee and Simpson, *Cases on Equity* (1934) Preface at X.*

Thus, while the Rules of Civil Procedure establish a uniform procedure for both law and equity suits, the practical effect has been to continue the earlier practice in matters requiring a segregation of law and equity. The character of the court as a court of equity or a court of law, depending upon the nature of the causes alleged, has been recognized in the District Court's order, the resulting effect of which is to duplicate the situation which existed in the *Enelow* case.

The defendant's argument was apparently inspired by the views of Judge Charles E. Clark in *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corp.*, 124 F. (2d) 563 (C. C. A. 2d, 1942). In that case the question was simply whether an order refusing trial by jury constituted a final judgment. There had been a demand by a counterclaimant for a jury trial on the issues of both the complaint and the counterclaim, and it was held that an order annulling the jury demand was not an appealable order. Judge Clark, allud-

* The distinction is important for reasons other than to differentiate between jury and non-jury causes. Federal courts apply state statutes of limitations which are predicated upon an "action at law" or a "suit in equity". *Williamson* v. *Columbia Gas & Electric Corp.*, 110 F. (2d) 15 (C. C. A. 3rd, 1939) cert. den. 310 U. S. 639 (1940). The federal court may award additional costs in an "equity" cause. *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 312 U. S. 81 (1941). Injunctions may be granted only in equity causes. *Fleming* v. *Peavy-Wilson Lumber Co.*, 38 F. Supp. 1001 (D. C. La., 1941). See *Cavicchi* v. *Mohawk Mfg. Co.*, 27 F. Supp. 961 (D. C. N. Y., 1939); Bunn, Jurisdiction and Procedure of the Courts of the United States (4th ed. 1939) 178-180. The necessity for differentiating between legal and equitable claims and the difficulty encountered when equitable and legal claims are joined in the same suit are illustrated in the following cases: *Fraser* v. *Geist*, 1 F. R. D. 367 (D. C. Pa., 1940); *Ransom* v. *Staso Milling Co.*, 3 F. R. D. 128 (D. C. Vt., 1941); *Frissell* v. *Rateau Drug Store*, 28 F. Supp. 816 (D. C. La., 1939).

ing to this Court's "ingenious reasoning", expressed dissatisfaction with the *Enelow* case. But the *Enelow* case was obviously not applicable since the order appealed from—the order annulling the jury demand—was an interlocutory order without any injunctive force. There was no direction that the trial of a legal issue be stayed until after the disposition of an equitable issue; nor was there a refusal to stay the trial of one issue until another had been decided. The order if it was to be considered appealable at all would have to be a final order under Section 128 of the Judicial Code, 28 U. S. C. § 225 (1940). This it was not, as the court correctly held. Judge Clark also properly remarked of the case before him, "This is not the *Enelow* case", but he proceeded to question the applicability of the doctrine of the *Enelow* case on its own facts. As we have shown, however, the Rules of Civil Procedure have in no way altered the injunctive effect of the order appealed from.

Although Judge Clark's expressions of opinion concerning the Rules are given weight by the courts, as defendant points out (Brief, p. 13), we advert to his opinion in *Sherwood* v. *United States*, 112 F. (2d) 587 (C. C. A. 2d, 1940), involving the applicability of the Rules of Civil Procedure in suits under the Tucker Act, and to the opinion of this court reversing, *United States* v. *Sherwood*, 312 U. S. 584 (1941), in which Judge Clark's interpretation was found erroneous.

Judge Clark in his expression of opinion was largely influenced by the view of Professor Moore (3 Moore's Federal Practice, p. 3026), quoted on page 15 of defendant's

brief. But, it is significant that Moore discredited the theory of the *Enelow* case as applied on the facts actually there presented to the court and would, therefore, be more than ready to reach the conclusion that the Rules of Civil Procedure have done away with the right of appeal recognized in the *Enelow* case. Such a view overlooks the realities of the situation which confronts the parties and, as we have already shown, is not warranted in the present case.

The decision of the Circuit Court of Appeals for the Third Circuit in *Cohen* v. *Globe Indemnity Co.*, 120 F. (2d) 791 (C. C. A. 3rd, 1941), cited on page 16 of defendant's brief, is also not pertinent. There while awaiting a retrial of an action on policies of burglary insurance the plaintiff filed a petition for reformation which was treated as a petition to amend the complaint. The court allowed the amendment and after a hearing the policy was reformed and the case set down for trial. The Circuit Court's only concern was whether this order for reformation was a "final decision" and found that it was not. The decision on its own facts is questionable. Cf. *Reeves* v. *Beardall*, 316 U. S. 283 (1942); *Jefferson Electric Co.* v. *Sola Electric Co.*, 122 F. (2d) 124 (C. C. A. 7th, 1941). But regardless of whether the order there in question was a final appealable order it is clear that it lacked injunctive force and hence was not an appealable interlocutory order. The order there appealed from did not enjoin a trial on plaintiff's action; in fact, it directed that the parties proceed with the jury trial. The same court that decided the *Cohen* case has certified the question now before the court. Apparently the court did not consider that its approach in that case was applicable to the facts of the present case.

On the other hand the continued vitality of the doctrine of the *Enelow* case is evidenced by the very recent decision of the Circuit Court of Appeals for the Ninth Circuit in *Modin* v. *Matson Nav. Co.*, 128 F. (2d) 194 (C. C. A. 9th, 1942), where the court considered whether a judgment transferring a civil cause to the admiralty calendar was appealable. The court held that it was unnecessary to determine whether the judgment was a final one since even if it was interlocutory "it was, in effect, an interlocutory judgment granting an injunction restraining further proceedings at law and hence was appealable under § 129 of the Judicial Code, 28 U. S. C. A. § 227", citing the *Enelow* case.

In the present case the District Judge, exercising his injunctive power, has effectually enjoined a jury trial of plaintiffs' action until such time as defendant has had a non-jury trial on the equitable counterclaim. The manifest purpose of the statute permitting appeals from interlocutory orders granting injunctions is to enable a party to seek immediate appellate relief from an order the continuance of which may seriously prejudice his interests. Upon grounds argued to the District Judge the plaintiffs contend that the defendant's counterclaim should be dismissed. If defendant's argument on the question of the appealability of the order is sustained not only can a review in an appellate court of the question of the propriety of the counterclaim not be had but the issue on the counterclaim will be tried while plaintiff's action reposes on the calendar of jury cases. The desirability of having the question of the propriety of the equitable counterclaim determined at this time is apparent. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 525 (1897).

In *State* v. *District Court of First Judicial Dist.*, 117 P. (2d) 494, (Mont., 1941) the extraordinary writ of prohibition was invoked to prevent the lower court from hearing a legal issue as an equity cause without a jury. Said the court:

> "The trial of the case would undoubtedly cost considerable and, if the plaintiff is entitled to a jury as we have found she is, any judgment rendered in the case would not be binding upon her. We believe in such a situation this court should interpose its extraordinary power to correct the error of the district court at this stage of the case."

Similar considerations govern on the question now before this Court. The decision of the District Judge below from which plaintiffs have appealed, is as far reaching as it is unusual. It holds that the doctrine of *Erie Railroad Company* v. *Tompkins, supra,* has overruled the principle laid down by this Court in *Phoenix Mutual Life Insurance Co.* v. *Bailey,* 13 Wall. 616 (1871) which has been consistently followed by this Court and the lower courts. The District Judge decided that even though the insured is no longer available to give his version of alleged misrepresentations in procuring the insurance, a law action brought by the beneficiaries for death benefits can be converted by the insurance company into a cancellation suit by the mere expedient of filing an equitable counterclaim—thereby effectively dispensing with Section 16 of the Judiciary Act of 1789, 28 U. S. C. § 384 (1940) and the Seventh Amendment. The merits of that decision are not now before the Court for determination; but the desirability of a review of that decision at this stage of the proceeding—prior to costly and time-consuming trials—is manifest. Such con-

siderations undoubtedly influenced this Court in the *Enelow* case. There, under the precise situation which exists in the present case, this Court determined that before a plaintiff may be compelled to proceed to a trial without a jury on the issue of the insured's alleged fraud in the procurement of the insurance contract, he may obtain a review of the question whether such issue was properly injected into the case. This right of review is a substantial, valuable, remedial right which is favored in the law. *In re Hurley Mercantile Co.*, 56 F. (2d) 1023, 1025 (C. C. A. 5th, 1932) cert. den. 286 U. S. 555; *In re Madonia*, 32 F. Supp. 165 (D. C. Ill., 1940). It should not be lightly annulled as defendant urges.

Conclusion.

An order directing that the issue raised by an equitable counterclaim shall be heard and disposed of by the court prior to the legal issue raised by the complaint and answer has injunctive force and is appealable under Section 129 of the Judicial Code. The question certified by the court below should, therefore, be answered in the affirmative.

Respectfully submitted,

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